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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-2084

BETTY J. BIRCH,

Appellant,

v.

JOHN LEHMAN, Secretary of
UNITED STATES DEPARTMENT OF
THE NAVY,

Appellee.

Appeal from the United States District Court, for the Eastern District of North Carolina, at New Bern. F. T. Dupree, Jr., District Judge.

Argued: April 2, 1982 Decided: May 5, 1982

Before WINTER, Chief Judge, MURNAGHAN and SPROUSE, Circuit Judges.

SPROUSE, Circuit Judge. Betty Birch appeals the district court's dismissal of her civil rights action brought against the Secretary of the Navy pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. Finding her contentions to be without merit, we affirm.

The United States Navy Regional Medical Center (NRMC) at Camp LeJeune, North Carolina, dismissed Birch from her position as librarian in December, 1976, following charges of poor work performance. Prior to her dismissal Birch had filed a formal administrative complaint, claiming that she had been denied several benefits because of her sex. She continued to pursue administrative remedies following her dismissal, and on April 23, 1979, NRMC informed her that several of the issues she had raised would receive further consideration, but that others, including that of her dismissal, had been rejected. She was informed that this was NRMC's final decision with respect to the rejected issues and was advised that she could appeal to the Equal Employment Opportunity Commission (EEOC) within 15 days of the final decision or directly to the

district court within 30 days. A third option -- appeal to the EEOC followed by a civil action in district court within 30 days of the EEOC decision -- also was explained to her. Birch had been informed of these rights to appeal on several other occasions prior to the April 23 letter.

Birch appealed to the EEOC on May 7, 1979, and received that agency's decision on October 23, 1980, which held that the Navy had improperly rejected several discrimination allegations involving benefits, but that the rejection of the issue of her dismissal had been proper. The EEOC decision contained the following language:

> Pursuant to 29 C.F.R. 1613.282, the appellant is hereby notified that this is the Commission's final decision and that appellant has a right to file a civil action in the appropriate United States District Court within thirty (30) calendar

days of receipt of this decision.[1] In the same letter, both the appellant and the NRMC were notified that the Commission, in its discretion, could reopen and reconsider any previous decision. The NRMC was required to make any request for reopening within 30 days, but there was no time limit placed on Birch, who could petition for reopening at any time. On November 20, 1980, Birch requested the EEOC to reopen her case. That request was rejected on May 18, 1981,[2] because she failed

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[1]The 30-day time limit is set forth in 42 U.S.C. 2000e-16(c), which provides in part:

> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit . . . or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit . . .an employee . . .may file a civil action as provided in section 2000e-5 of this title . . .

[2]Birch received the Denial of Request to Reopen on May 21, 1981.

to meet the criteria for reconsideration set forth in 29 C.F.R. 1613.25 (1981), which allows reopening when "new and material evidence is available that was not readily available when the previous decision was issued." Birch filed a civil action in district court on June 17, 1981, more than eight months after her receipt of the EEOC's final decision of October 23, 1980. The district court dismissed her complaint because it had not been timely filed.

Birch now argues that there was no "final action" by the EEOC until she was notified of the denial of her request for reopening and that she had 30 days from that date to file her district court action.

We disagree. Accepting appellant's position would mean that no decision by the EEOC could be regarded with certainty as a "final action" since a plaintiff could revive his

claim at any time, merely by requesting reconsideration. Such a result would render the statutory 30-day requirement meaningless. The "final action" by the EEOC[3] was its denial of Birch's appeal, which she received on October 23, 1980, and she was required to file her appeal to the district court within thirty days from that time. The fact that she made her request for reopening within thirty days of October 23 does not alter this result. Birch was clearly notified in the decision received October 23, 1980, that such decision was final, and that any reconsideration of that decision was entirely in the discretion of the EEOC. The judgement is, therefore, affirmed.

AFFIRMED.

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[3]The appeal function of the Civil Service Commission was transferred to the Equal Employment Opportunity Commission by § 3 of the 1978 Reorganization Plan ¶1, 43 Fed. Reg. 19807.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-2084

Betty J. Birch, Appellant,

versus

John Leighman, Secretary of United States Department of the Navy, Appellee.

ORDER

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Sprouse with the concurrence of Judge Winter and Judge Murnaghan.

For the Court,

/s/ William K. Slate, II

CLERK

FILED

JUN 16 1982

U.S. Court of Appeals
Fourth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NEW BERN DIVISION

BETTY J. BIRCH,

Plaintiff,

VS.

JOHN LEHMAN, Secretary, United States Department of the Navy,

Defendant.

NO. 81-44-CIV-4

O R D E R

F I L E D

OCT 22 1981

J. RICH LEONARD, CLERK
U.S. DISTRICT COURT

This is a civil rights action in which plaintiff alleges that she was discriminated against because of her sex during her employment as the librarian at the United States Navy Regional Medical Center at Camp LeJeune, North Carolina. The action is presently before the court on defendant's motion to dismiss for lack of subject matter jurisdiction.

The motion is based upon an asserted failure to file this action within thirty days of receipt of the final decision of the Equal Employment Opportunity Commission on

plaintiff's employment discrimination charge. Plaintiff received the final EEOC decision on October 23, 1980. That decision stated that ". . . this is the Commission's final decision and . . . appellant has a right to file a civil action in the appropriate United States District Court within thirty (30) calendar days of receipt of this decision." Within that thirty-day period, plaintiff pursuant to a procedure outlined in the decision filed a request that the EEOC reopen the case and reconsider the decision. On May 21, 1981 plaintiff received the EEOC's decision denying the petition for reconsideration, and this action was filed within thirty days of that denial. The denial of the petition for reconsideration stated in reference to the earlier decision that "that decision is the final decision in this matter . . .

The appellant may have a right to file a civil action in the appropriate United States District Court within the time limitations set forth in the final decision on the appeal." (Emphasis added.) See Exhibit 1 to Affidavit of Betty J. Birch.

Plaintiff contends that the decision received on October 23, 1980 established the right to request a reconsideration as an additional administrative step, from which it was reasonably inferred that the thirty-day time period would be tolled by filing such a request. It is further contended that the juxtaposition in the final decision of notice of the thirty-day time period and notice of a right to request reconsideration creates uncertainty regarding when the EEOC's action will be considered final, and that the government should be bound by the ambiguity. Finally, plaintiff

contends that the plaintiff could not reasonably have predicted a statutory interpretation that the petition for reconsideration would not toll the thirty-day period because she relied on pre-existing case law to the contrary.

Precisely these issues were recently addressed by Judge MacKenzie of the Eastern District of Virginia in Crane v. Hidalgo, No. 80-1090-N (E.D.Va., Aug. 4, 1981). Judge MacKenzie held that the filing of a request for reconsideration does not toll the running of the thirty-day period, and that the notice of a right to sue in the final decision is not ambiguous or confusing. This court concurs. Plaintiff was clearly notified of the finality of the EEOC decision. The notice of right to request a reopening of the case leaves such reconsideration entirely in the discretion of the EEOC and

implies that reconsideration will be granted only in unusual circumstances. Furthermore, the denial of the request for reopening refers again to the previous decision as the "final" one and refers to the earlier thirty-day period as the time within which the charging party might bring a civil action. An analogy to the Federal Rules of Civil Procedure is instructive, for a pending motion to alter or amend a judgment pursuant to Rule 59 or for relief from judgment pursuant to Rule 60 does not affect the finality of the judgment.

Each of the cases relied upon by Judge MacKenzie for the conclusion that the thirty-day period may not be extended by filing a request for reopening might be distinguished on its facts from the present case, for here plaintiff has not pursued "fictitious avenues of review," Chickillo v. Commanding Officer, Naval Air Engineering Center,

406 F.Supp. 807, 809 (E.D.Pa. 1976), aff'd, 547 F.2d 1159 (3d Cir. 1977), or filed requests to reopen long after the thirty-day period has expired. Hofer v. Campbell, 581 F.2d 975, 977 (D.C.Cir. 1978); Clark v. Goode, 499 F.2d 130, 132 (4th Cir. 1974). Plaintiff has not attempted to revive a stale claim nor to "mock the thirty-day limitation." Clark v. Goode, supra, 499 F.2d at 134. Nevertheless, the time periods established in Title VII may not be disregarded by the court. E.g., Eastland v. Tennessee Valley Authority, 553 F.2d 364 (5th Cir.), cert. denied, 434 U.S. 985 (1977).

For these reasons, the court concludes that this action was not filed within the applicable thirty-day period and that defendant's motion must be allowed. Accordingly, the action is dismissed.

SO ORDERED.

/s/ F. T. DUPREE, JR.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

October 19, 1981.

I certify the foregoing to be a true and correct copy of the original.

J. Rich Leonard, Clerk
United States District Court
Eastern District of North Carolina

By /s/ (illegible)
Deputy Clerk

CIV 32
(7/63)

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NORTH CAROLINA

CIVIL ACTION FILE No. 81-0044-CIV-4
NEW BERN DIVISION

BETTY J. BIRCH

vs.

JOHN LEIGHMAN, SECRETARY OF UNITED STATES DEPARTMENT OF THE NAVY

JUDGMENT

F I L E D
OCT 22 1981

J. Rich Leonard, Clerk
U. S. District Court

This action came on for (hearing) before the Court, Honorable F. T. Dupree, Jr. Chief , United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged the Court concludes that this action was not filed within the applicable thirty-day period and that the defendant's motion to dismiss must be

be allowed. Accordingly, the action is dismissed.

FILED AND ENTERED THIS 22ND DAY OF OCTOBER 1981, AT NEW BERN, N. C.

cc:

U. S. Attorney
Eastern District of North Carolina
P.O. Box 26897
Raleigh, North Carolina 27611

David E. Kirkpatrick
Trial Attorney
Office of the General Counsel
Litigation Division
Bldg. A-67, Naval Station
Norfolk, Virginia 23511

J. LeVonne Chambers
Suite 730, East Independence Plaza
951 South Independence Boulevard
Charlotte, North Carolina 28202

Dated at New Bern, North Carolina, this 22nd day of October, 1981.

J. RICH LEONARD
CLERK OF COURT

BY /s/ (illegible)
Deputy Clerk

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Docket Number: B01781011

Discrimination Complaint
Appeal of: Betty Birch
Agency: Dept. of the Navy
Final Decision Date: 9/3/80

Ms. Betty Birch
1005 Daniel Drive
Jacksonville, North Carolina 28540

Dear Ms. Birch:

Enclosed please find the final decision of the Equal Employment Opportunity Commission in the discrimination complaint appeal referred to above.

Sincerely,

/s/ Nestor Cruz/LLC
Nestor Cruz
Director, Office of
Review and Appeals

Enclosure

cc: Chairman
Employee Appeals Review Board
Department of the Navy
801 N. Randolph Street, Rm. 720
Arlington, Virginia 22203

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Betty J. Birch, Appellant	)	
v.	)	Appeal No. B01781011
United States Department of the Navy	)	

DECISION

INTRODUCTION

This is an appeal from the final agency decision which rejected appellant's complaint alleging sex discrimination (female) respecting the terms and conditions of her employment and her eventual termination. Appellant brought this equal employment opportunity complaint under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16. The appeal was accepted for decision by the Commissioners of the Equal Employment Opportunity Commission in accordance with the provisions of EEOC Order No. 960 dated January 2, 1979, as amended.

BACKGROUND

Appellant, a Librarian, GS-9, filed a sex (female) discrimination complaint against the agency on September 20, 1976. On September 27, 1976, the agency rejected the complaint for lack of specificity. Upon appeal of that rejection by appellant, the complaint was remanded to the agency by the Civil Service Commission to secure additional information from appellant and to allow her to clarify her allegations. During the pendency of her complaint, appellant was terminated by the agency. As a consequence thereof, she wrote to the Civil Service Commission alleging that her termination was discriminatory and a further act of harassment by the agency. On remand, appellant submitted a forty-one (41) page affidavit from which the agency concluded that she raised the following allegations of sex discrimination:

1) not issued of a civilian identification card; 2) denied assistance to run her unit; 3) obligated to type; 4) not allowed to attend professional staff meetings; 5) denied a reserved parking space; 6) issued job performance standards; 7) warned about inadequate performance; and 8) harassed by being verbally assaulted, and given letters of caution, warning and reprimand. Of the above listed allegations, only the fourth (4th), fifth (5th), and the verbal assaults part of the eighth(8th) allegation were accepted by the agency for processing. The remaining allegations were rejected because: 1) allegations one (1) and the letter of caution part of allegation eight (8) concerned matters over which the agency lacked control; 2) allegations two (2), three (3), six (6), seven (7), and the letter of reprimand portion of allegation

eight (8) were rejected because they concerned matters previously adjudicated in a grievance proceeding; and 3) other allegations or issues raised by appellant in her affidavit constituted new matter and were therefore untimely (this apparently included the matter of appellant's termination).

Appellant was advised of the finality of the agency's decision as regards the rejected issues and appeals therefrom.

ANALYSIS AND FINDINGS

The applicable provisions of the Equal Employment Opportunity Commission's regulations governing rejection of complaints found at 29 C.F.R. §1613.215 provide in part:

> [t]he head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations

> in a complaint which are not within the purview of [Title VII] or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency. 29 C.F.R. §1613.215.

Based on the above provision, we must conclude that the agency improperly rejected the allegations dealing with the rejection of her identification card and the letter of caution as concerning matters over which the agency lacked control. A rejection based on the ground stated by the agency is tantamount to a decision on the merits and is not authorized by 29 C.F.R. §1613.215, above.

The agency's rejection of other allegations raised by appellant on the ground that they constituted matter previously adjudicated in a grievance proceeding was also improper.

Appellant is entitled to pursue independently both a grievance proceeding and a Title VII action. An adverse finding in the grievance-arbitration proceeding is not res judicata in the subsequent Title VII action, but may be admitted as evidence and accorded such weight as is deemed appropriate. Alexander v. Gardner-Denver Co., 315 U.S. 36 (1974). Therefore, considering the distinctive nature of a Title VII action and the comprehensive scheme for relief thereunder (see Brown v. General Services Administration, 425 U.S. 820 (1976)), the agency erroneously rejected allegations two (2), three (3), six (6), seven (7), and part of eight (8) because they were allegedly previously adjudicated in a grievance proceeding.

We, however, agree with the agency's determination that allegations concerning appellant's termination constituted new matter

and were untimely filed. The Equal Employment Opportunity Commission's regulations require, at 29 C.F.R. §1613.214(a)(1), that the complainant bring the matter causing him to believe he has been discriminated against to the attention of the EEO Counselor within thirty (3) days of its occurrence. We can not conclude, based on the record as a whole, that appellant's non-compliance with 29 C.F.R. §1613.214 (a)(1)(i) was justified, particularly since appellant did not show that she was unaware of this requirement. Myles v. Schlesinger, 436 F.Supp. 8 (E.D. Pa. 1977); Ettinger v. Johnson, 410 F.Supp. 519 (E.D. Pa. 1976).

CONCLUSION

Based on the record as a whole, the final agency decision is affirmed in part and reversed in part and the matter is remanded to the agency for further proceedings consistent with this decision.

NOTICE OF RIGHT TO FILE A CIVIL ACTION

Pursuant to 29 C.F.R. §1613.282, the appellant is hereby notified that this is the Commission's final decision and that appellant has a right to file a civil action in the appropriate United States District Court within thirty (30) calendar days of receipt of this decision.

NOTICE OF RIGHT TO REQUEST REOPENING

The appellant and the agency are hereby notified that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued;

2. The previous decision involves an erroneous interpretation of law or regulations or misapplication of established policy; or

3. The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

This notice is in accord with 29 C.F.R. Section 1613.235(a). The agency's attention is directed to 29 C.F.R. Section 1613.235(b) for time limitations on agency requests to reopen.

FOR THE COMMISSION:

/s/ Treva McCall
Acting Executive Officer
Executive Secretariat

9/3/80
DATE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF REVIEW AND APPEALS
2401 E Street, N.W.
Washington, D.C. 20506

May 18, 1981

Betty J. Birch
1001 Daniel Drive
Jacksonville, North Carolina 28540

Docket No. 05 81 0088

Dear Ms. Birch:

Enclosed please find the final decision of the Equal Employment Opportunity Commission in the discrimination complaint appeal referred to above.

Sincerely,

/s/ Nestor Cruz
Nestor Cruz, Director
Office of Review and Appeals

Enclosure

cc: Department of Navy
Chairman, Employee Appeals Review Board
801 N. Randolph St., Room 720
Arlington, VA 22203

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

IN THE MATTER OF THE REQUEST TO REOPEN BY BETTY J. BIRCH	REQUEST NO. 05810088

DENIAL OF REQUEST TO REOPEN

Betty J. Birch (hereinafter referred to as appellant) filed a request on November 20, 1980, that the Equal Employment Opportunity Commission reopen and reconsider its decision in Betty J. Birch v. Department of the Navy, Appeal No. B01781011, dated September 3, 1980.

EEOC Regulation 29 C.F.R. Sec. 1613.235 sets forth the criteria for reopening a previous decision of this Commission. Under the Regulation, the Commissioners may, in their discretion, reopen and reconsider any previous decision if the party requesting reopening and reconsideration submits written evidence or argument which

tends to establish one or more of the prescribed criteria.

Appellant requested reopening on the basis that the agency was not prejudiced by her failure to follow "the letter" of EEOC Regulation 29 C.F.R. Sec. 1613.214(a)(1)(i) requiring contact with an agency equal employment opportunity counselor within 30 calendar days of the effective date of a personnel action. In an affidavit attached to the request to reopen, appellant also stated that on December 16, 1976 (two days after the effective date of her termination), she was informed by an employee in an EEOC district office that, with regard to her subsequent termination, she need only supplement her formal appeal already filed with the Civil Service Commission.

The Commission has reviewed the request of the appellant to reopen the decision in Appeal No. B01781011, and the entire record in this case. The Commission finds after reviewing the record in this case that appellant's request does not tend to establish any of the criteria set forth in 29 C.F.R. Sec. 1613.235 for the following reasons.

EEOC Regulation 29 C.F.R. Sec. 1613.235 allows reopening when "new and material evidence is available that was not readily available when the previous decision was issued." Appellant in requesting reopening on that ground has failed to establish that the information provided was not readily available before the previous decision was issued. The evidence is the affidavit which the appellant could have executed at any time prior to the date of the previous decision. There is nothing in the

record showing external factors prevented her from doing so.

With respect to appellant's claim that waiving the time limits resulted in no prejudice to the agency, it should be noted that EEOC Regulation 29 C.F.R. Sec. 1613.214(a)(4) provides a mechanism for extending applicable time limits. Appellant's failure to seek relief under that Regulation cannot be disregarded. Having already filed one complaint with the agency, it is reasonable to assume she had knowledge of the operable procedures.

In view of the above, the request to reopen the Commission's decision in Appeal No. B01781011 is denied and that decision is the final decision in this matter. There is no further right of administrative appeal from a decision of this

Commission on a request to reopen.

NOTICE OF POSSIBLE RIGHT TO FILE A CIVIL ACTION

The appellant may have a right to file a civil action in the appropriate United States District Court within the time limitations set forth in the final decision on the appeal.

FOR THE COMMISSION:

5/5/81
Date

/s/ Treva McCall
Executive Officer
Executive Secretariat